

ceeding in equity for the review and vacating of a concededly grossly unjust judgment.

The Fifth Circuit in the *Buttengenbach* case (supra) held that because of "extraordinary circumstances", doubtless appealing to the equity conscience of the Court, the Court reversed the Tax Board and reopened the case despite the lapse of the statutory period. In certain respects the *Buttengenbach* case is not dissimilar to the case at bar. As here, the Commission of Internal Revenue conceded the error, and also, as here, counsel, as a matter of duty, interposed a plea of lack of jurisdiction. The Circuit Court, however, despite the fact that four years had elapsed, overruled the jurisdictional plea, commenting that where there is no dispute as to the material facts "we see no reason either in law or in public policy why any proceeding where the rights of no third party have intervened may not be reopened".

Respondent's brief explains the *Buttengenbach* case by pointing out that the tax judgment was based upon a stipulation between the parties. This fact, however, did not render the tax judgment any less "final",—or does counsel for the respondent mean to suggest *that there are circumstances* giving power to the Circuit Court to review despite the lapse of the statutory period? If this be so, how about the "extraordinary circumstances" disclosed by the petition in the instant case?

In the case of *Sweet v. Commissioner* (supra) decided by the First Circuit, the Court refused to reopen a tax case two years after decision because of a different interpretation of the revenue laws involving certain deductions which the taxpayer sought the benefit of, the Court holding that under Section 1005 (1140) of the Internal Revenue Act there was finality. In its opinion the First Circuit referred to the opinion of the Fifth Circuit in the *Buttengenbach* case, stating that it "is supportable, if at all, upon the peculiar circumstances emphasized by the Court at page 631". While, therefore, not following the Fifth Circuit, the First Circuit recognized, inferentially

at least, that there *might* be circumstances of an extraordinary nature justifying the review of a tax judgment despite the provisions of Section 1140 of the Revenue Act,—such circumstances obviously being of an equitable nature.

In *White's Will v. Commissioner of Internal Revenue* (also cited by the respondent) the Third Circuit Court, while refusing to reopen a tax judgment after the lapse of the statutory period, referred to the decision of the Fifth Circuit in the *Buttengenbach* case as presenting “extraordinary circumstances” but not, directly at least, disagreeing with it.

The Second Circuit in the *Monjar* case (*supra*), cited by counsel for the respondent both in his answer and brief, refused to follow the *Buttengenbach* case, again referring, however, to the “extraordinary circumstances” which led the Fifth Circuit to reopen that case, and certainly not expressing disapproval of such action. If, as counsel for the respondent suggests in his brief, the Second Circuit in the instant case may have assumed jurisdiction and denied the petition in the exercise of judicial discretion, it would not have followed its own decision in the *Monjar* case, but rather that of the Fifth Circuit in the *Buttengenbach* case,—and thus confusion becomes worse confounded.

It would seem apparent that these divergences among the Circuits are at least indicative of considerable doubt and that there is a real conflict which this Court should resolve.

POINT III

The decision of this Court in the *Hazel-Atlas* case imposes a duty upon the Circuit Court to vacate grossly unjust and manifestly unconscionable judgments where there is no material fact in dispute.

If, as respondent's brief at page 13 suggests, the Circuit Court may have assumed jurisdiction and denied the peti-

tion in the exercise of judicial discretion, then plainly there was an abuse thereof in failing to follow the authority and principles established by the applicable decision of this Court in the *Hazel-Atlas* case,—which are not limited in application to grossly unjust judgments resulting from fraud. Where no material fact is in dispute this Court held that it was the duty of the Circuit Court to vacate its judgment.

CONCLUSION

Upon all or any of the three grounds above noted it is respectfully submitted that this Court should grant a writ of certiorari in accordance with the specifications set forth in Rule 38. The questions presented are of fundamental importance and should be clarified and decided in the interests of the true administration of tax laws and of justice.

In this respect respondent's brief (at p. 13) states:

"Incalculable confusion would result from the re-opening of old tax cases merely because it was asserted that questions had been decided incorrectly many years before when no claim of fraud or corruption is involved."

Counsel for respondent apparently borrowed (in part) this phrase from the opinion of the Circuit Court in *Sweet v. Commissioner* (supra) without, however, giving the entire context. The Court stated:

"Incalculable confusion would result from a general reopening of old tax cases *because of a claimed conflict with superseding court decisions.*" (Emphasis ours.)

This, of course, is quite different from the situation in the instant case. It should be apparent that the correction in equity of *concededly grossly unjust and manifestly un-*

conscionable judgments based upon a fundamental factual error apparent on the face of the Court's opinion would hardly lead to "incalculable confusion". On the contrary, the denial of such relief is rather to discredit both the administration of the Tax Law and of the judicial process in connection therewith and poisons the fount of justice. The exaction of an admittedly grossly unjust tax, on grounds of expediency, is a fundamental violation of rights long established by arduous effort and ultimately can have only evil results.

It is respectfully submitted that the petition for certiorari should be granted.

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